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# INDEX


| | Page |
|---|---|
| Opinions below | 2 |
| Jurisdiction | 2 |
| Question presented | 2 |
| Statutes and other authorities involved | 3 |
| Statement | 3 |
| Summary of argument | 7 |
| Argument: | |
| The basis for measuring gain or loss from the sales of stock of the Standard Oil Export Corporation in 1934 and 1936 is the fair market value of the predecessor stock as of the date of the testator's death | 8 |
| Conclusion | 17 |
| Appendix | 18 |


## CITATIONS


| | |
|---|---|
| Cases: | |
| *Augustus* v. *Commissioner*, 118 F. (2d) 38 | 15 |
| *Becker* v. *Anchor Realty Co.*, 3 F. Supp. 22, aff'd. 71 F. (2d) 355 | 11, 12 |
| *Brewster* v. *Gage*, 280 U. S. 327 | 11, 14, 15 |
| *Chandler* v. *Field*, 63 F. (2d) 13 | 11, 12 |
| *Helvering* v. *Campbell*, and related cases, Nos. 473–475, this Term | 7, 9, 10, 16 |
| *Helvering* v. *Gambrill*, No. 472, this Term | 7, 9, 10, 16 |
| *Helvering* v. *New York Trust Co.*, 292 U. S. 455 | 10 |
| *Helvering* v. *Reynolds*, pending on writ of certiorari, No. 684, this Term | 7, 9, 10, 15, 16 |
| *Higgins* v. *Helvering*, No. 253, this Term | 10 |
| *Hopkins* v. *Commissioner*, 69 F. (2d) 7 | 11, 12 |
| *Huggett* v. *Burnet*, 64 F. (2d) 705 | 11, 12 |
| *Lane* v. *Corwin*, 63 F. (2d) 767 | 11, 12 |
| *Maguire* v. *Commissioner*, No. 346, this Term | 7, 9, 10, 16 |
| *Molter* v. *Commissioner*, 69 F. (2d) 7 | 11, 12 |
| *Pringle* v. *Commissioner*, 64 F. (2d) 863 | 10, 11, 12 |
| *United States* v. *Standard Oil Co.*, 173 Fed. 177, aff'd. with modifications, 221 U. S. 1 | 5 |
| *Van Vranken* v. *Helvering*, 115 F. (2d) 709 | 7 |
| *Warner* v. *Commissioner*, 72 F. (2d) 225, certiorari denied 293 U. S. 620 | 11, 12 |




312222—41——1

| | Page |
|---|---|
| **Statutes:** | |
| Revenue Act of 1928, c. 852, 45 Stat. 791, Sec. 113 | 12 |
| Revenue Act of 1934, c. 277, 48 Stat. 680: | |
| Sec. 112 (U. S. C., Title 26, Sec. 112) | 8 |
| Sec. 113 (U. S. C., Title 26, Sec. 113) | 8, 18 |
| Revenue Act of 1936, c. 690, 49 Stat. 1648: | |
| Sec. 112 | 8 |
| Sec. 113 | 8, 19 |
| **Miscellaneous:** | |
| G. C. M. 10260, XI–1 Cum. Bul. 79 | 12, 13 |
| H. R. 1, 70th Cong., 1st Sess | 14 |
| H. Rept. No. 704, 73d Cong., 2d Sess. | 15 |
| Sen. Rept. No. 558, 73d Cong., 2d Sess., p. 34 | 15 |
| Treasury Regulations 33 (1918 Revision), Art. 4, Par. 44 (1916 Act) | 10 |
| Treasury Regulations 45, Art. 1562 (1918 Act) | 10 |
| Treasury Regulations 62, Art. 1563 (1921 Act) | 10 |
| Treasury Regulations 65 (1924 Act), Art. 1594 | 10 |
| Treasury Regulations 69 (1926 Act), Art. 1594 | 10 |
| Treasury Regulations 86, Art. 113 (a) (5)–1 | 19 |
| Treasury Regulations 94, Art. 113 (a) (5)–1 | 21 |

# In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 734

MARY FLAGLER CARY, PETITIONER

*v.*

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

No. 735

HARRY HARKNESS FLAGLER, PETITIONER

*v.*

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

No. 736

ESTATE OF ANNIE L. FLAGLER, DECEASED, HARRY HARKNESS FLAGLER, EXECUTOR, PETITIONER

*v.*

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

No. 737

JEAN LOUISE MATTHEWS, PETITIONER

*v.*

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

*ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT*

**BRIEF FOR THE RESPONDENT**

## OPINIONS BELOW

The memorandum opinions of the Board of Tax Appeals (No. 734, R. 75; No. 735, R. 27; No. 736, R. 25; No. 737, R. 25) are unreported. The *per curiam* opinion of the Circuit Court of Appeals (R. 93) [1] is reported in 116 F. (2d) 800.

## JURISDICTION

The judgments of the Circuit Court of Appeals were entered on January 22, 1941. (No. 734, R. 94; No. 735, R. 48; No. 736, R. 46; No. 737, R. 45.) The petition for writs of certiorari was filed on January 31, 1941, and granted on March 10, 1941. (No. 734, R. 95; No. 735, R. 49; No. 736, R. 47; No. 737, R. 46.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTION PRESENTED

Under Section 113 (a) (5) of the Revenue Acts of 1934 and 1936, is the basis for computing the gain or loss on the sale of securities by a beneficiary of a testamentary trust (1) the value of the stock when delivered to the beneficiary, or (2) the value on the date of death of the testator? [2]

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[1] All record references, unless otherwise indicated, are to the record in the *Cary* case, No. 734.

[2] Annie L. Flagler, now deceased, actually received the shares which she sold in 1936 as a gift from her husband, Harry Harkness Flagler, in 1932. (No. 736, R. 29.) But since she is required to use the basis of the donor (Section 113 (a) (2) of the Revenue Act of 1936, Appendix, *infra*,

## STATUTES AND OTHER AUTHORITIES INVOLVED

The statutes and other authorities involved are set out in the Appendix, *infra*, pp. 18–21.

## STATEMENT

On May 20, 1913, Henry M. Flagler (hereinafter called the testator), a resident of Florida, died, leaving a last will and testament dated February 1, 1902, and seven codicils executed from 1903 to 1912, inclusive. The will and codicils thereto were duly admitted to probate in St. Johns County, Florida, on May 24, 1913. (R. 18.)

Under his will (R. 23) the testator created a trust covering substantially all of his property, including stock of the Standard Oil Company of New Jersey (R. 18). The purpose of the trust was to provide money to continue and carry on the development of the testator's extensive interests in railroads and hotel and land companies in Florida. (R. 23–24.) The trust was to continue for a period of five years after testator's death and for a further period of five years if the hotel or railroad companies required financial aid. (R. 25.)

The will provided (R. 25–26):

> Seventh: At the expiration of said trust, the Trustees shall deliver, assign, and trans-

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p. 18), and he received the predecessor stock from the testamentary trustees, the situation is the same as if she had herself been the recipient of the stock from the trustees and the question is thus the same in all the cases.

> fer by proper instrument or instruments to my son Harry Harkness Flagler, Five Thousand (5,000) shares of the capital stock of the Standard Oil Company of New Jersey, which shares of stock are hereby given to my said son. And in the event that at the expiration of said trust there shall be any child or children of my said son living, then I direct that eight thousand shares of the stock of the said Standard Oil Company shall be delivered, assigned and transferred to such child or children as shall then be living, such children, if there be more than one child, to take such stock in equal proportions, and should there be no child of my said son living at the termination of said trust, then such eight thousand shares of stock shall remain a part of such trust estate and go to my wife with the balance of the residue thereof the same as if no provision had been made herein as to such eight thousand shares of stock. * * *

The residue of the estate was given to the testator's wife. (R. 28.) The trustees were given full powers of management of the trust property. (R. 28–29.)

The codicil executed September 13, 1912 (R. 46) contained the following provision (R. 45):

> Second. It is my will that the legacy and bequest to my son, be void and lapse, if my said son should die before me, and in that event, the legacy and bequest, to him, shall become and be part of my residuary estate.

Prior to the death of the testator, and pursuant to a court decree providing for the disintegration of the Standard Oil Company of New Jersey,[1] there had been issued to and received by the stockholders of that company one ordinary share of the stock of the Anglo-American Oil Company, Ltd., for each share held of the stock of Standard Oil Company of New Jersey. (R. 19.) Thus, the trustees received Anglo-American Oil Company, Ltd., shares instead of Standard Oil Company shares.

The petitioner Harry Harkness Flagler was the only son of the testator and is the son referred to in the will and various codicils. (No. 735, R. 22.) At the date of the expiration of the trust, three children of Harry Harkness Flagler were living, two of whom are the petitioners Mary Flagler Cary and Jean Louise Matthews. (No. 734, R. 19; No. 737, R. 21.) Annie L. Flagler, since deceased, was the wife of Harry Harkness Flagler. (No. 736, R. 22.)

On April 26, 1921, the trustees determined that it was no longer necessary to hold certain shares of the stock of the Anglo-American Oil Company, Ltd., as a part of the corpus of the trust and they delivered them to petitioner Harry Harkness Flagler. (No. 735, R. 23–24.) Subsequent to May 20, 1923, but as of that date, the trustees transferred the remaining Anglo-American Oil shares to

[1] *United States* v. *Standard Oil Co.*, 173 Fed. 177 (C. C. E. D. Mo.), affirmed with modifications, 221 U. S. 1.

Harry Harkness Flagler, Mary Flagler Cary, and Jean Louise Matthews, and the trust terminated. (No. 735, R. 24; No. 734, R. 19; No. 737, R. 22.)

On January 31, 1930, there was a tax-free reorganization of the Anglo-American Oil Company, Ltd., pursuant to which one share of preferred stock of the Standard Oil Export Corporation was exchanged for each 5⅝ shares of the Anglo-American Oil Company, Ltd. (No. 735, R. 24–25; No. 734, R. 20; No. 737, R. 23.)

The present litigation arises out of sales of Standard Oil Export stock made by petitioners in 1934 and 1936. (No. 734, R. 20–21; No. 735, R. 24–25; No. 736, R. 22; No. 737, R. 23.)[4] In filing returns for 1934 and 1936 petitioners took as the basis for measuring gain from the sales in 1934 and 1936 the fair market value of the predecessor stock on the date of transfer of such stock to them by the trustees. The Commissioner, holding that the basis for measuring gain was the fair market value of the predecessor stock on the date of testator's death, May 20, 1913, determined deficiencies in all four cases. (No. 734, R. 11–15; No. 735, R. 12–17; No. 736, R. 11–15; No. 737, R. 12–17).

The Board of Tax Appeals sustained the Commissioner (R. 75) and the court below affirmed, *per curiam,* on the authority of its prior decision

[4] As pointed out above, footnote 2, Annie L. Flagler received the shares she sold as a gift from her husband, Harry Harkness Flagler.

in *Van Vranken* v. *Helvering,* 115 F. (2d) 709 (R. 93) now pending on petition for certiorari, No. 836 this Term.

## SUMMARY OF ARGUMENT

The only issue involved in these cases is the basis to be used in measuring the gain from the sales of the Standard Oil Export Corporation stock in 1934 and 1936. The applicable statute provides that the basis of property acquired by bequest, devise or inheritance shall be the fair market value of such property "at the time of such acquisition." The Government contends that the "time of such acquisition" is the date of the testator's death, not the time when the shares were distributed to the beneficiaries by the testamentary trustees, and that the basis is therefore the fair market value of the predecessor stock as of such date of death. We rely upon the argument in the brief filed for the Commissioner in the companion case of *Helvering* v. *Reynolds,* No. 684 this Term, and believe that the issues in these cases were determined in the cases of *Maguire* v. *Commissioner,* No. 346 this Term, *Helvering* v. *Gambrill,* No. 472 this Term, and *Helvering* v. *Campbell* and related cases, Nos. 473–475 this Term, all decided March 31, 1941.

Petitioners' argument, based upon the legislative history of the phrase "time of such acquisition," is not controlling.

312222—41——2

## ARGUMENT

### THE BASIS FOR MEASURING GAIN OR LOSS FROM THE SALES OF STOCK OF THE STANDARD OIL EXPORT CORPORATION IN 1934 AND 1936 IS THE FAIR MARKET VALUE OF THE PREDECESSOR STOCK AS OF THE DATE OF THE TESTATOR'S DEATH

The only issue involved in these cases is the basis to be used in measuring the gain from the sales of Standard Oil Export Corporation stock in 1934 and 1936. The parties are agreed that the basis of the shares sold is that of the shares of the Anglo-American Oil Company, Ltd., surrendered on the exchange. See Sections 112 (b) (3) and 113 (a) (6) of the Revenue Acts of 1934 and 1936. Hence the specific issue is whether under Section 113 (a) (5) of the Revenue Acts of 1934 and 1936, Appendix, *infra* pp. 18–19, the basis is the fair market value of the Anglo-American shares as of the date of Henry M. Flagler's death on May 20, 1913, or the fair market value of the shares as of the date of their distribution to Harry Harkness Flagler, Mrs. Cary and Mrs. Matthews in 1921 and 1923.

Section 113 (a) (5) provides that the basis for computing gain or loss on the sale of property acquired by bequest, devise or inheritance shall be "the fair market value of such property at the time of such acquisition." The Treasury Regulations provide, Appendix, *infra,* pp. 19–21, and the Government contends, that the "time of * * *

acquisition" by the beneficiary of a testamentary trust is the date of the testator's death, regardless of the nature of the beneficiary's interest. The argument in the brief filed for the Commissioner in the companion case of *Helvering* v. *Reynolds*, No. 684 this Term, is applicable here and we rely upon the reasons there set forth without repetition. As there stated, we believe not only that the legislative history of Section 113 (a) (5) and the whole purpose and structure of the statute support our view, but that the issues here were plainly determined in the cases of *Maguire* v. *Commissioner*, No. 346 this Term, *Helvering* v. *Gambrill*, No. 472 this Term, and *Helvering* v. *Campbell* and related cases, Nos. 473–475 this Term, all decided March 31, 1941.

The principal argument made in petitioners' brief is that, at the time of passage of the Revenue Act of 1934, the words "time of * * * acquisition" had come to have an accepted construction, namely, that "legatees did not acquire property until a substantial interest therein became vested in them", and that Congress must be deemed to have used the words in this sense in enacting the 1934 Act. (Pet. Br. pp. 14–31.) The claim that the phrase possessed the meaning alleged is based upon certain Office Decisions of the Bureau of Internal Revenue and upon certain decisions of the lower Federal courts interpreting the same words as used in the Revenue Acts prior to 1928. Al-

though this contention seems plainly foreclosed by the *Maguire, Gambrill,* and *Campbell* decisions, we will nevertheless consider it briefly.

In the first place, the construction of the phrase in question was by no means clearly settled at the passage of the Revenue Act on May 10, 1934. This is evident from the following facts:

(1) As pointed out in our brief in the *Reynolds* case, Office Decisions have none of the force and effect of Treasury Decisions and do not commit the Department to any interpretation of the law. *Reynolds* Brief, p. 15; *Higgins* v. *Helvering,* No. 253 this Term, decided February 3, 1941; *Helvering* v. *New York Trust Co.,* 292 U. S. 455, 468. On the other hand, Treasury Regulations applicable to the Acts prior to 1928 consistently stated that the basis of property acquired by bequest, devise, or inheritance should be the value at date of such acquisition, making no distinction between "vested" and "contingent" interests.[5]

(2) Prior to May 10, 1934, only one Circuit Court of Appeals had ruled squarely upon the question at issue.[6] The other decisions prior to that time either arose under the different provisions of

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[5] Treasury Regulations 33 (1918 Revision), Article 4, Par. 44 (1916 Act); Treasury Regulations 45, Article 1562 (1918 Act); Treasury Regulations 62, Article 1563 (1921 Act); Treasury Regulations 65 (1924 Act) and 69 (1926 Act), Article 1594.

[6] *Pringle* v. *Commissioner,* 64 F. (2d) 863 (C. C. A. 9th).

the 1928 Act,[7] or, while making a distinction between vested and contingent remainders, found the remainder to be vested and held the date of acquisition to be the date of the testator's death.[8]

(3) The effect of the Supreme Court's decision in *Brewster* v. *Gage*, 280 U. S. 327, and whether the *Pringle* case was consistent with that decision, were by no means clear at the passage of the 1934 Act. This is apparent from the decision of the Circuit Court of Appeals for the Second Circuit in *Warner* v. *Commissioner*, 72 F. (2d) 225, certiorari denied 293 U. S. 620. In that decision, rendered about two months after the passage of the 1934 Act, the court pointed out that the principle of *Brewster* v. *Gage* might be controlling in the case of a remainderman regardless of the nature of his interest (p. 228):

> It perhaps may be doubted if a remainder interest, whether "indefeasibly vested," "vested subject to be divested," or "contingent," is not "acquired" at the date of the testator's death within the meaning of the decision in *Brewster* v. *Gage*, 280 U. S. 327.

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[7] *Lane* v. *Corwin*, 63 F. (2d) 767 (C. C. A. 2d); *Becker* v. *Anchor Realty Co.*, 3 F. Supp. 22 (D. C. E. D. Mo.), aff'd May 10, 1934, 71 F. (2d) 355 (C. C. A. 8th).

[8] *Chandler* v. *Field*, 63 F. (2d) 13 (C. C. A. 1st); *Huggett* v. *Burnet*, 64 F. (2d) 705 (App. D. C.); *Molter* v. *Commissioner*, 69 F. (2d) 7 (C. C. A. 7th); *Hopkins* v. *Commissioner*, 69 F. (2d) 11 (C. C. A. 7th).

(4) As a matter of fact, there apparently existed a difference of opinion between the departmental rulings upon which petitioners rely and some of the court decisions, upon which petitioners also rely, as to what the rule actually was. In G. C. M. 10260, XI–1 Cum. Bull. 79, to which petitioners refer as embodying the departmental rule, the General Counsel of the Bureau of Internal Revenue held that the question of whether the taxpayer "acquired" property under Section 113 (a) (5) of the 1928 Act did not depend upon a technical distinction between "vested" and "contingent" interests but upon whether the taxpayer obtained "substantial ownership". This apparently was the position of the court in the *Pringle,* and perhaps the *Lane* and *Becker* cases, *supra.* It is also the rule upon which petitioners rely (Pet. Br. pp. 32–35). However, the Circuit Courts of Appeals for the First and Seventh Circuits, as well as the Court of Appeals for the District of Columbia, considered the question to be simply whether the interest was "vested" or "contingent", the two former courts holding the time of acquisition to be the date of the decedent's death where the interest was vested but subject to be divested. *Chandler, Molter, Hopkins,* and *Huggett* cases, *supra.* That this difference of opinion was a real one is evident from the decision of the Circuit Court of Appeals for the Second Circuit in the *Warner* case, *supra,*

rendered shortly after the passage of the 1934 Act. There the court expressly repudiated the departmental rule as set forth in G. C. M. 10260, saying (p. 227):

> "In a memorandum of the Treasury Department (G. C. M. 10260, XI–1, Cum. Bul. 79) construing the provisions relating to realizations of gain or loss (as changed in the Revenue Act of 1928), it was said that 'the distinction between interests which are technically contingent and interests which are technically vested, subject to being divested should in general be ignored. * * * The question is whether the taxpayer has acquired sufficiently substantial ownership to satisfy the spirit and purpose of section 113 (a) (5) [26 USCA § 2113 (a) (5)], and in general, an interest which is vested, subject to being divested, does not give a taxpayer that sort of ownership.' The same idea was apparently in the mind of the court in Pringle v. Commissioner (C. C. A.) 64 F. (2d) 863, 864, when it remarked that 'a person cannot be said to have "acquired" property within the meaning of the Revenue Act [1921], § 202 (a) (3), * * * before he has some substantial ownership therein.' But it would be harder to use substantial ownership as a test than to distinguish between vested and contingent remainders. In spite of the casuistry involved in differentiating between vested and contingent remainders, courts would have criteria available, however technical and unsatisfac-

> tory, which they are accustomed to use. But such a vague test as substantiality would leave us wholly without a standard. The question, we think, is whether, under the law of Ohio, where the testator was domiciled, the remainder interest vested in the taxpayer at the time of the testator's death subject only to be divested if the taxpayer died before the expiration of the trust. If it did, the remainder was vested, though not indefeasibly and the securities were accordingly 'acquired' on October 4, 1921."

In view of this divergence it can scarcely be assumed that Congress, without making any mention of the fact, incorporated either one rule or the other in the 1934 Act.

In the second place, regardless of the status of the rule in departmental rulings and in the lower Federal courts, there is no evidence whatever that Congress intended to adopt any such construction in the 1934 Act; on the contrary, such evidence as exists points to the assumption by Congress that the principles of *Brewster* v. *Gage* would apply in all cases:

No distinction between "vested" and "contingent" interests had ever been made in the Acts prior to 1928. When the House proposed to clarify the meaning of "acquisition" in 1928, it expressly fixed the crucial date as the date of the decedent's death. (H. R. 1, 70th Cong., 1st Sess.) The changes made by the Senate Committee were

intended to take care of relatively minor situations where the date of death would not be applicable, not to change the basic value-at-death rule. (See *Reynolds* brief, pp. 10–11.) When, in 1934, the reversion to the former phrase occurred, both Committee reports explained it simply as a result of the clarification resulting from *Brewster* v. *Gage*, which, according to the Committees, "defined 'the date of acquisition' to mean the date of death in the case of all property passing by bequest, devise, and inheritance, whether real or personal." (H. Rept. No. 704, 73rd Cong., 2d Sess., p. 28; S. Rept. No. 558, 73rd Cong., 2d Sess., p. 34.)[9] At no time in the Committee reports was there any reference to departmental rulings, to lower Federal court decisions, or to any case other than *Brewster* v. *Gage*. At no time, either in Committee reports or in the legislation, was any word inserted to indicate an intent to distinguish between "vested" and "contingent" remainders.[10]

Finally, as against any remote possibility that Congress intended to incorporate in the 1934 Act the departmental-lower court construction, or

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[9] While it is true, as petitioners contend, that one of the reasons for the reversion to the previous language in the 1934 Act was to eliminate the distinction between the treatment of real and personal property, nevertheless the Committee's statement is very broad and contains no hint of an exception for contingent remainders.

[10] For further consideration of the intent of Congress in the 1934 Act, see Judge Arant's discussion in *Augustus* v. *Commissioner*, 118 F. (2d) 38 (C. C. A. 6th).

either version thereof, there must be weighed the considerations already set forth in the *Reynolds* brief, including the fact that petitioners' construction is contrary to the whole purpose and structure of the Act; that petitioners' construction makes the application of the statute depend upon the complexities and vagaries of local law; that, for purposes of fixing a basis for tax purposes upon property which the taxpayer has realized and sold, there exists no reason for making a distinction between interests that are "vested," "vested subject to be divested," or "contingent"; and that, following the promulgation of the Treasury Regulations interpreting the 1934 Act in the manner here contended for, Congress reenacted the provision without change, the provision remaining unchanged at this time.

Much of petitioners' brief is taken up with the argument that petitioners did not possess "substantial ownership" of the property in question at the testator's death, and that the interest acquired by petitioners was contingent under Florida law. (Pet. Br. pp. 32–52.) In view of the *Maguire*, *Gambrill*, and *Campbell* decisions, we have not briefed this point; nor did the court below pass upon it. Should this Court rule, contrary to our contention, that the nature of the taxpayer's interest is material, we assume that it will remand to the Circuit Court of Appeals for ruling on the point under the appropriate state law.

## CONCLUSION

The decision of the court below should be affirmed.

Respectfully submitted.

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APRIL, 1941.

## APPENDIX

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (unadjusted) of property.*—The basis of property shall be the cost of such property; except that—

* * * * * *

(2) *Gifts after December 31, 1920.*—If the property was acquired by gift after December 31, 1920, the basis shall be the same as it would be in the hands of the donor or the last preceding owner by whom it was not acquired by gift, except that for the purpose of determining loss the basis shall be the basis so determined or the fair market value of the property at the time of the gift, whichever is lower. If the facts necessary to determine the basis in the hands of the donor or the last preceding owner are unknown to the donee, the Commissioner shall, if possible, obtain such facts from such donor or last preceding owner, or any other person cognizant thereof. If the Commissioner finds it impossible to obtain such facts, the basis in the hands of such donor or last preceding owner shall be the fair market value of such property as found by the Commissioner as of the date or approximate date at which, according to the best information that the Commissioner is able to obtain, such property was acquired by such donor or last preceding owner.

* * * * * *

(5) *Property transmitted at death.*—If the property was acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent, the basis shall be the fair market value of such property at the time of such acquisition. In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the date of the grantor's death. For the purpose of this paragraph property passing without full and adequate consideration under a general power of appointment exercised by will shall be deemed to be property passing from the individual exercising such power by bequest or devise.

* * * * *

(U. S. C., Title 26, Sec. 113.)

* * * * *

Revenue Act of 1936, c. 690, 49 Stat. 1648:

Sections 113 (a) and (5) are identical with the above-quoted provisions of the Revenue Act of 1934.

Treasury Regulations 86, promulgated under the Revenue Act of 1934:

ART. 113 (a) (5)-1. *Basis of property acquired by bequest, devise, or inheritance—(a) Property included.*—Section 113 (a) (5) applies—

(1) to all property passing from a decedent by his will or under the law govern-

ing the descent and distribution of property of decedents; and

(2) to property passing under an instrument which, under section 113 (a) (5) is treated as though it were a will, but applies to such property only at the times and to the extent prescribed in section 113 (a) (5).

(b) *Basis.*—Under the law governing wills and the descent and distribution of the property of decedents, all titles to property acquired by bequest, devise, or inheritance relate back to the death of the decedent, even though the interest of him who takes the title was, at the date of death of the decedent, legal, equitable, vested, contingent, general, specific, residual, conditional, executory, or otherwise. Pursuant to this rule of law, section 113 (a) (5) prescribes a single uniform basis rule applicable to all property passing from a decedent by will or under the law governing the descent and distribution of the property of decedents. Accordingly, the time of acquisition of such property is the death of the decedent, and its basis is the fair market value at the time of the decedent's death, regardless of the time when the taxpayer comes into possession and enjoyment of the property. For example, if distribution of personal property left by a decedent is not made until one year after his death, the basis of such property in the hands of the legatee is its fair market value at the time when the decedent died, and not when the legatee actually received the property; or, if the bequest is of the residue to trustees in trust, and the executors do not distribute the residue to such trustees until five years after the death of the decedent, the basis of each piece of property left by the decedent and thus received, in the hands

of the trustees, is its fair market value at the time when the decedent dies; or, if the bequest is to trustees in trust to pay to A during his lifetime the income of the property bequeathed, and after his death to distribute such property to the survivors of a class, and upon A's death the property is distributed to the taxpayer as the sole survivor, the basis of such property, in the hands of the taxpayer, is its fair market value at the time when the decedent died.

The purpose of the Act, in prescribing a single uniform basis rule for property acquired by bequest, devise, or inheritance, is, on the one hand, to tax the gain, in respect to such property, to him who realizes it (without regard to the circumstance that at the death of the decedent it may have been quite uncertain whether the taxpayer would take or gain anything); and, on the other hand, not to recognize as gain any element of value solely from the circumstance that the possession or enjoyment of the taxpayer was postponed. Such postponement may be, for example, until the administration of the decedent's estate is completed, until the period of the possession or enjoyment of another has terminated, or until an uncertain event has happened. It is the increase or decrease in the value of property reflected in a sale or other disposition which section 113 (a) (5) recognizes as the measure of gain or loss.

* * * * *

Treasury Regulations 94, promulgated under the Revenue Act of 1936:

Article 113 (a) (5)–1 of these Regulations contains provisions identical with those of Article 113 (a) (5)–1 of Regulations 86, above quoted.

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# SUPREME COURT OF THE UNITED STATES.

Nos. 734, 735, 736, 737.—October Term, 1940.

Mary Flagler Cary, Petitioner,
734 *vs.*
Commissioner of Internal Revenue

Harry Harkness Flagler, Petitioner,
735 *vs.*
Commissioner of Internal Revenue

Estate of Annie L. Flagler, Deceased, Harry Harkness Flagler, Executor, Petitioner,
736 *vs.*
Commissioner of Internal Revenue

Jean Louise Matthews, Petitioner,
737 *vs.*
Commissioner of Internal Revenue

On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[May 26, 1941.]

Mr. Justice Douglas delivered the opinion of the Court.

Henry M. Flagler died on May 20, 1913. Petitioners are legatees under a testamentary trust created under his will. The trust continued for a period of ten years from his death and terminated on May 20, 1923. As of that time the trustees delivered to petitioners[1] certain securities which were sold by them in 1934 and 1936. The question presented is whether the basis for computing gain or loss on such sales under § 113(a)(5) of the Revenue

[1] Some securities had previously been delivered to Harry Harkness Flagler, petitioner in No. 735, on April 26, 1921. Annie L. Flagler, whose estate is the petitioner in No. 736, received the securities here involved as a gift from her husband, Harry Harkness Flagler. The situation therefore is the same as to both these parties, since it is stipulated that he had received the securities as indicated above.

Acts of 1934 (48 Stat. 680) and 1936[2] (49 Stat. 1648) is the value of the securities when delivered to the legatees or their value on the date of death of the decedent. Petitioners make substantially the same argument for application of the former criterion as did respondent in *Helvering* v. *Reynolds,* No. 684, decided this day. And they contend that under Florida law they had at the date of death only contingent interests. But assuming they are correct in the latter contention, it is of no avail. For the reasons stated in *Helvering* v. *Reynolds, supra,* the proper basis was the value of the securities at the death of the decedent. Accordingly, the judgments of the court below (116 F. (2d) 800) must be

*Affirmed.*

The CHIEF Justice and Mr. Justice ROBERTS dissent for the reasons stated in their dissent in *Helvering* v. *Reynolds,* No. 684, decided this day.

A true copy.

Test:

*Clerk, Supreme Court, U. S.*

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[2] Sec. 113(a)(5) of the 1936 Act is the same as § 113(a)(5) of the 1934 Act. Art. 113(a)(5)-1 of Treasury Regulations 94, promulgated under the 1936 Act, contains provisions identical with those of Art. 113(a)(5)-1 of Regulations 86 under the 1934 Act. The relevant portions of that section and regulation under the 1934 Act are set forth in Helvering *v.* Reynolds, *supra.*